

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* * * * *	CIVIL ACTION
MARK AHLQUIST, et al	11-138
	*
VS.	* OCTOBER 13, 2011
	*
CITY OF CRANSTON, et al	* PROVIDENCE, RI
* * * * *	*

HEARD BEFORE THE HONORABLE RONALD R. LAGUEUX
SENIOR DISTRICT JUDGE
(Bench Trial)

APPEARANCES:

FOR THE PLAINTIFFS:	LYNETTE J. LABINGER, ATTY. Roney & Labinger LLP 344 Wickenden St. Providence, RI 02903
FOR THE DEFENDANTS:	JOSEPH V. CAVANAGH, JR., ESQ., and JOSEPH V. CAVANAGH, III, ESQ. Blish & Cavanagh, LLP 30 Exchange Terrace Providence, RI 02903
Court Reporter:	Anne M. Clayton, RPR One Exchange Terrace Providence, RI 02903

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1 13 OCTOBER 2011 -- 2:00 P.M.

2 THE COURT: Good afternoon, everyone. The case
3 before the Court is Civil Action 11-138L, Mark Ahlquist
4 as next friend, parent and guardian of J.A., a minor
5 versus the City of Cranston, by and through Robert F.
6 Strom, in his capacity as Director of Finance; and by
7 and through the School Committee of the City of
8 Cranston and the School Committee of the City of
9 Cranston, by and through Andrea Iannazzi, in her
10 capacity as Chair of the School Committee of the City
11 of Cranston. It's quite a mouthful.

12 Will the attorneys identify themselves for the
13 record, please.

14 MS. LABINGER: Your Honor, Lynette Labinger,
15 Roney and Labinger, for the Plaintiffs, Mark Ahlquist
16 and the minor.

17 And could I just say that, unless the Court
18 insists on it, we waive the obligation to redact the
19 minor's name. Everyone knows who she is, and it's just
20 becoming --

21 THE COURT: So anybody who reads the Providence
22 Journal knows it's Jennifer Ahlquist?

23 MS. LABINGER: Jessica Ahlquist.

24 THE COURT: Is it Jennifer?

25 MS. LABINGER: Jessica Ahlquist.

1 THE COURT: Jessica Ahlquist.

2 MS. LABINGER: Yes. We ask for leave not to
3 have to redact her name. We don't have a problem
4 redacting other minors' names, but it will save us a
5 lot of time.

6 THE COURT: All right.

7 MS. LABINGER: Thank you.

8 MR. CAVANAGH, JR.: Joseph V. Cavanagh from
9 Blish and Cavanagh for the Defendant.

10 MR. CAVANAGH, III: Joseph Cavanagh, III, from
11 Blish and Cavanagh for the Defendant.

12 MS. WINDHAM: Lori Windham with The Becket Fund
13 for Religious Liberty for the Defendants.

14 THE COURT: All right. As I sent word to the
15 attorneys yesterday, through my law clerk, I think this
16 is the kind of case that's important for the Court to
17 take a view of the area of Cranston West in general and
18 the auditorium in particular. So I'm not waiting for
19 the lawyers to make a motion for a view, which is the
20 normal event. I'm going to do it sua sponte. Of
21 course, the view is not evidence. The purpose of a
22 view is to aid the fact finder or fact finders to
23 better understand the evidence. And it's particularly
24 important in this case because we have a record in this
25 case. Unlike an appellate judge, I'm going to read a

1 record. There will not be any live testimony.

2 When I hear a non-jury case generally when
3 there's a witness on the stand and there's something I
4 don't quite understand, I ask questions myself to get
5 clarification. I won't have that pleasure in this
6 case, so I think it's important that I have a view so I
7 understand when I'm reading from a cold record what the
8 context might well be. So that's why I am ordering sua
9 sponte the taking of a view. We're going to take it
10 now this afternoon, and then we'll return here and
11 we'll have this book of exhibits marked, and they're
12 all original exhibits. Those are the exhibits that I
13 will read. I haven't read those yet. I was waiting to
14 read -- I've read the briefs several times, each brief
15 several times.

16 And so we will recess to take a view. I think
17 we'll probably be back here around three o'clock to
18 start arguments. I don't like to restrict lawyers in
19 their arguments but we're going to be pressed for time
20 this afternoon so the Plaintiffs' side will argue
21 first, one hour. Defendants' side will argue second,
22 one hour. And then I'll give the Plaintiffs' side 20
23 minutes for rebuttal and that will complete the
24 arguments in the case and I, of course, will take this
25 case under advisement and write an opinion later. Are

1 there any questions?

2 MR. CAVANAGH, JR.: No.

3 MS. LABINGER: No, your Honor.

4 THE COURT: All right. I'm going to the view
5 with a U.S. marshal and my deputy clerk here and my law
6 clerk, and I presume all of you have transportation to
7 go there.

8 MR. CAVANAGH, JR.: Should we meet you outside
9 the high school at the steps?

10 THE COURT: Yes. Why don't we do that. See you
11 on the view.

12 (Recess taken from 2:10 p.m. to 3:15 p.m.)

13 THE COURT: First order of business is what to
14 do with all these exhibits. These are all the original
15 exhibits in this binder, right?

16 MR. CAVANAGH, JR.: Yes, your Honor.

17 THE COURT: How should we mark it? Should we
18 just mark it joint exhibits and have the clerk sign it
19 and so that this is the official exhibits of the case?

20 MS. LABINGER: Your Honor, we submitted an
21 exhibit list, which provided in sequential order which
22 ones were joint exhibits, which ones were Plaintiffs'
23 exhibits, and which ones were defense exhibits. A
24 substantial number are joint exhibits. I believe you
25 should have a list that has numbers 1 through 36. Some

1 of them have subparts. Exhibits 1 through 14 are joint
2 exhibits. Plaintiffs' exhibits are marked 15 through
3 22 and 32 and 33. That's because we submitted a couple
4 extra exhibits when we filed our reply.

5 The Defendants' exhibits were 23 through 31 and
6 34 through 36. For ease of everyone's briefing, we
7 agreed to number them sequentially so that we didn't
8 have ones and A's. I know that there are a number of
9 subparts, and they are also identified in the exhibit
10 list. I don't believe that the Plaintiff has any
11 objections to Defendants' exhibits. The only thing
12 that I would observe is that the declaration of
13 Reverend Dr. Anderson, which is Exhibit 18, is a copy.
14 I have the original if it's necessary to have his
15 original signature. There's a photocopy with the
16 signature in your file now, and I leave that to my
17 colleagues as to whether that's sufficient.

18 MR. CAVANAGH, JR.: That's not necessary to have
19 the original; however, I do have an objection to that
20 exhibit that I'll argue to you when she's finished.

21 THE COURT: I thought these were all agreed
22 upon.

23 MS. LABINGER: I don't think there's any
24 question about authenticity.

25 MR. CAVANAGH, JR.: No. Right. On 18, your

1 Honor, it's relevance, and I'd offer that to you for
2 that reason. And also we think his opinion is
3 something from an expert that the Court does not need
4 under these circumstances. That's our grounds for
5 number 18.

6 THE COURT: Well, I'm not going to deal with
7 that now. Leave that list with the clerk so she can
8 mark it on top of this and with the signature these are
9 the official exhibits of the Court with a reservation
10 on 18.

11 MR. CAVANAGH, JR.: Right. And for the record,
12 they have exhibits relating to the Hugh B. Bain Middle
13 School. That's Exhibit 21A, B and C and Exhibit 22.
14 My objection to that is relevance. They are irrelevant
15 under these circumstances, and these are my objections.
16 So 18 it's on relevance grounds, and it's an opinion
17 that you don't need sitting as the Court; and 21 and 22
18 it's relevance of those exhibits.

19 MS. LABINGER: And your Honor, we have addressed
20 the issue of the relevance of the Bane exhibits, and we
21 would ask that since you're sitting without a jury
22 since there's no question about authenticity that you
23 accept them all and that as you decide this case you
24 can determine how much --

25 THE COURT: This is a non-jury case so I'll

1 accept them all as full exhibits, and I'll determine
2 the weight of them.

3 MS. LABINGER: Thank you.

4 There may be an exhibit list there, but I have
5 another copy of it if I can bring it forward.

6 THE COURT: All right. The clerk will mark that
7 binder as -- based on the list you've given us.

8 All right. I'm ready to hear final arguments.

9 Ms. Labinger will argue first.

10 MS. LABINGER: Thank you. Your Honor, I want to
11 start by thanking you for graciously agreeing to give
12 me an hour for argument. I, respectfully, will not be
13 taking an hour of time.

14 In this matter, we filed a memorandum in support
15 of our motion for preliminary injunction. We also
16 followed up with a fairly substantial brief. Our
17 opening brief, which I think is Document 18, in support
18 of our application for injunctive and declaratory
19 relief and damages have been stipulated if the Court
20 finds liability in this matter.

21 And we also submitted a fairly lengthy reply
22 memorandum. I am pretty much talked out, so I will not
23 take a whole hour, or anywhere near that, unless the
24 Court has a lot of questions.

25 THE COURT: You can assume that I've read these

1 briefs very thoroughly so you can hit the high spots.

2 MS. LABINGER: Well, I spent a lot of time on
3 them as did my brother, co-counsel, Mr. Bender, who is
4 not here today, and I do want to state as I've advised
5 our client that he will be withdrawing from the case.
6 He's leaving his current law firm and will be the chief
7 appellate counsel for the Rhode Island Public Defender
8 in a few more weeks and is no longer able to
9 participate. That's the only reason he will be
10 withdrawing, but I did want to alert the Court as to
11 why he's not here. And he was a major contributor in
12 our arguments in every step of the way.

13 I think the parties have given a great
14 explication on their respective positions on the state
15 of the law on establishment clauses. This is an
16 Establishment Clause case exclusively. I would point
17 out that the exhibits consist of deposition transcripts
18 from which the parties have in their own respects
19 developed what they believe is the history of the
20 creation of the school prayer, which you saw today; the
21 creation -- the composition of the text, which was the
22 result of a student council being tasked at the early
23 days of Cranston High School West to develop key items
24 for this new school, a school prayer; a school creed;
25 colors, which I think are red and gray; a school

1 mascot, which is the Falcons. And this was composed in
2 1960; and once it was composed, the school, instead of
3 having daily recitation of the Lord's Prayer, which
4 everyone pointed out was the Catholic version, and I --

5 THE COURT: Was the Lord's Prayer actually
6 recited at Cranston West at any time?

7 MS. LABINGER: Yes. Yes. The evidence is that
8 in the early days before the School Prayer was
9 composed, every day they would recite the Lord's
10 Prayer, the Catholic version.

11 THE COURT: In every class?

12 MS. LABINGER: Yes. It was either led by the
13 homeroom in the homeroom or once they got the public
14 address system, then someone would lead it, a student
15 over public address. And the evidence is clear that
16 once the School Prayer was composed and approved as the
17 School Prayer of Cranston West, they started reciting
18 the School Prayer, the one you saw on the wall today,
19 instead of the Lord's Prayer. And there's some
20 question between the parties as to whether the School
21 Prayer was ever recited once it was affixed to the
22 auditorium wall. The Defendants claim that it was not.
23 We submitted some evidence from a high school teacher
24 who later became a principal that it was recited on
25 occasion. He could not have been confused about timing

1 because he wasn't there before 1964 when the auditorium
2 was there. So -- but that just tells us about the
3 history. We all agree that at some point they stopped
4 reciting the School Prayer, before Ms. Ahlquist got
5 there, many years beforehand.

6 The evidence is very clear that when the School
7 Prayer was originally composed and recited, there was
8 no auditorium. In those days, Cranston West was a
9 junior and senior high school so for some classes they
10 went for well more than the three or four years that
11 one normally associates with high school. They started
12 in junior high school. And the building was built in
13 stages, and you saw today how the auditorium is a
14 stand-alone building. It was built as a separate
15 module from the main area. And it was built and opened
16 we're not quite sure but probably nineteen sixty --
17 either the fall of 1963 or sometime in 1964. And the
18 reason we peg it as that, and I don't think there's a
19 material disagreement about it, is that the prayer and
20 creed, which are on the walls, were the gift of the
21 first graduating class which graduated in the spring of
22 1963. And according to the testimony of the class
23 vice-president, Mr. Zito, there was no auditorium for
24 them to graduate from. I think they went to the gym.

25 So they commissioned the School Prayer and the

1 School Creed to be designed, written out and affixed to
2 the newly under construction auditorium as a gift of
3 the first graduating class. They didn't write it.
4 They didn't write the creed or the prayer. They didn't
5 design it. They certainly approved the designs as did
6 their faculty advisor and the principal and whoever
7 else was involved in the process, but they, under no
8 circumstances, is this a student-created work of art.
9 And one of the things that you will see when you review
10 the photographs of the Bane prayer and creed and
11 auditorium, which is -- we are not complaining about
12 it, we don't have standing, but it is important
13 evidence because the configuration, when you look at
14 them side by side, and we've attached this as an
15 appendix to our opening brief, the creed for Bane,
16 which the Defendants believe was on the wall in that
17 auditorium since the 1920's and also bears a little
18 notation on the bottom, gift -- I think it says, Class
19 of 1956. The words of the two creeds --

20 THE COURT: Excuse me. Bane was a junior high
21 school.

22 MS. LABINGER: I think it was originally a
23 junior high school. Now it's a middle school.

24 THE COURT: I see.

25 MS. LABINGER: And the difference is one is 6, 7

1 and 8 and one is 6 and 7, and please don't ask me to be
2 definitive about which is which because I get confused,
3 but it is a middle school. It is currently operating
4 in Cranston, and up until some weeks --

5 THE COURT: The Bane students then go to West,
6 right?

7 MS. LABINGER: They go to West or some other
8 high school, yes. They're in the same general area, I
9 believe. In fact, the first graduating class, the
10 Class of 1963, had come from Bane, which they had been
11 there for junior high school and had come in the 9th
12 grade to West instead of going to the old Cranston High
13 School, which had then been renamed Cranston East. And
14 at Mr. Zito's deposition, he points out that he
15 expected to go to Cranston East, and I believe he said
16 he was expecting to play football there and was upset
17 that he got stuck at West, but they come from the same
18 geographic areas. And the creed at Bane and the creed
19 at West with the exception of one refers to Bane and
20 the other refers to West, and I think there are six
21 words like "generously" and "as maintained" are --
22 they're verbatim. Notwithstanding the fact that
23 Mr. Bradley, who was 13 when he composed the School
24 Prayer, claimed he wrote it himself, I think that was a
25 flight of fancy because it is almost word-for-word from

1 the Bane creed.

2 The prayers are different in text, but they both
3 start, "Our Heavenly Father." They both are in the
4 form of prayers, help us, grant us, beseeching
5 requests.

6 The way they're styled, each creed has, I
7 believe, it's a bird clutching branches in its talons.
8 Each prayer, the Bane and the West prayer, have an urn
9 or a lamp with wings over an open book over stylized
10 mountains. The only difference between them is that
11 one's in the Bane school colors and one is in the West
12 school colors. They both have, when you're facing the
13 stage, it's not there at Bane anymore, but when you
14 face the Bane stage, the creed was on the left, the
15 prayer was on the right.

16 So this appears to have been some kind of a
17 tradition or a design of those two Cranston schools and
18 not something that was a creation, as the Defendants
19 are claiming, of student artwork. They may have paid
20 for it to be painted and installed, but there's no
21 fingerprints of student artwork there anymore than as
22 you saw today when you saw the trophy cases and they
23 said "Gift of Class of 1997," that that trophy case
24 could be viewed as a work of a student-created art.

25 So the prayer and the creed were affixed to the

1 walls probably in 1963, '64. Under the Pleasant Grove
2 case, upon acceptance and installation by the City of
3 Cranston and its public schools became
4 Government-sponsored speech. Whether they were recited
5 for some period of time afterwards in assemblies, we
6 suggest they were, Defendants say they weren't, we all
7 agree that they stopped reciting them some time ago.
8 But they stayed up on the wall and the prayer is not,
9 as the Defendants would suggest, anything like a pledge
10 of allegiance, which in the Freedom From Religion
11 Foundation versus Hanover case was under consideration
12 by the First Circuit, the Plaintiffs in that case
13 conceded that the pledge of allegiance had a secular
14 purpose, being patriotism, a display of patriotism.

15 In contrast, this is a prayer. It's always been
16 a religious message. It's a religious communication,
17 and it's in a public school. And we believe that the
18 case law is very clear that expressions of religion in
19 public schools by the school as an official statement
20 of the school runs afoul of the Establishment Clause.

21 THE COURT: What's the strongest analogous case
22 that you have from the Supreme Court?

23 MS. LABINGER: I think probably Stone versus
24 Graham, which struck down the posting of the Ten
25 Commandments in classrooms in public schools. And in

1 that case, that's I think a 1980 case, the Supreme
2 Court rejected the school district's claim that it had
3 a secular purpose and they even had a plaque or
4 explanatory text to go with it. A lot of the times
5 that the Ten Commandments issue comes up the claim is
6 that there's an analogy because Moses was the first law
7 giver and that somehow or another in the courtrooms or
8 other settings that it has some historic difference,
9 which, obviously, it does; but just the plain,
10 unadorned expression of posting of the Ten Commandments
11 was struck down by the Supreme Court, and they rejected
12 the school district's claim that it has a secular
13 purpose because it has an explanatory text. The
14 Supreme Court said that they would look behind that.
15 That case is cited over and over again by the Supreme
16 Court. It is good law.

17 The Van Orden case, which the Defendants rely
18 upon, was a plurality decision, four in favor. Justice
19 Breyer providing the fifth vote to uphold the display,
20 and four dissenting. And I believe Justice Breyer, I
21 think it was the same day, in McCreary joined the four
22 dissenters in Van Orden to strike down the posting of
23 the Ten Commandments in public courtrooms, and again
24 looks beyond and the Court refused to accept the
25 state's claim that there was an explanatory plaque or

1 explanatory reason and said, No, we find a sectarian or
2 religious purpose and effect.

3 So Justice Breyer in his decision providing the
4 one vote on plurality decision is viewed in Supreme
5 Court case precedent as the narrowest and controlled
6 decision. And he made clear in that case that he
7 viewed it as a borderline case. He was very clear that
8 he distinguished the placement of a monument, which
9 listed the Ten Commandments and started, I believe, "I
10 am the Lord thy God," and then listed all Ten
11 Commandments without any explanatory text, a big, big,
12 monument, that he felt that this was a borderline case;
13 and he was persuaded because this monument was one of
14 many scattered across 22 acres of public grounds of the
15 Texas Capitol and pointed out in his decision that he
16 distinguished it from what could be the case in public
17 schools. And even the plurality, the four who he
18 joined, pointed out that public schools were different.

19 Our First Circuit in the Freedom From Religion
20 Foundation case pointed out in the Establishment Clause
21 area public schools are different.

22 So that you have the situation where you can
23 have a decision upholding a legislative session being
24 started with an invocation by a priest or a pastor in
25 Marsh versus Chambers as not a violation of the

1 Establishment Clause, but in Lee versus Weisman, a
2 holding out of -- that started here that having a rabbi
3 or member of the clergy provide an invocation or
4 benediction at a high school graduation violated --

5 THE COURT: Junior high school.

6 MS. LABINGER: What's that?

7 THE COURT: Junior high school. Nathan Bishop.

8 MS. LABINGER: Well, technically, your Honor, if
9 I may, it happened at the junior high school, but it
10 actually -- there was no injunction, and that case
11 could have been moot except for the fact that
12 Ms. Weisman, who I think is in the courtroom today, was
13 going on to high school and what they -- and that gave
14 her standing to object to what she anticipated would
15 happen next, which was it was going to happen in high
16 school.

17 So I don't think that that case can be in any
18 way distinguished from our situation because it
19 involved a junior high school because, in fact, the
20 junior high school prayer had been done and what the
21 Court was focusing on in ruling in favor of the
22 Weismans was that it was going to happen again at the
23 high school level and that was a violation of the
24 Establishment Clause. So --

25 THE COURT: Was Judge Breyer on the Court at

1 that time, Justice Breyer?

2 MS. LABINGER: I'm not quite sure.

3 THE COURT: I don't think he was.

4 MS. LABINGER: I don't think so.

5 Similarly, as I mentioned the distinction
6 between Van Orden upholding Ten Commandments in a big
7 public park and Stone versus Graham finding that it was
8 invalid to have the Ten Commandments displayed in
9 public classrooms. There's no evidence of any
10 recitation of the Ten Commandments or any prayers along
11 with it.

12 There are other cases that we have cited in our
13 brief, the Santa Fe case involving I think it was
14 prayer before athletic events; the old standbys,
15 Abington versus Schempp and Engel versus Vitale
16 prohibiting the daily recitation of prayers in public
17 schools; McCreary case, which had to do with
18 courtrooms. We believe that particularly because this
19 is a school setting the case law is clear that it
20 violates the Establishment Clause.

21 We certainly have gone through the very careful
22 analysis of the Lemon versus Kurtzman test to
23 demonstrate that there is a religious purpose and a
24 religious effect.

25 As I started by saying, these are not student

1 works of art. There's no way they could be viewed as
2 such on a fair understanding of what happened in this
3 case. They certainly -- the money and the items were
4 donated, but they weren't created by the students.
5 They were -- so they hired somebody. They were put up
6 by the school where the school wanted them. The city
7 says, well, maybe it wasn't the school, maybe it was
8 the architect, but the last time I looked the architect
9 is an agent of the city in designing and putting up a
10 school. The city owns them, and the prayer is very
11 visible.

12 Notwithstanding how dark it was today, your
13 Honor, I don't know if you noticed but right next to
14 the prayer was a burnt-out light bulb that when it's
15 lit provides illumination right on the School Prayer.
16 There were a number of burnt out light bulbs, but it
17 was pretty dark there today.

18 THE COURT: I was a little concerned about that.
19 There was very little lighting in the auditorium today.

20 MS. LABINGER: That's true. I was as well. I
21 wonder whether that's a safety issue for people going
22 in and out. But as you might have noticed, wherever
23 those banners are hung, and they're typically hung over
24 the light sconces, it seemed like every other one was
25 burnt out. And it was -- I've been in there now three

1 times. This was -- it was never -- I think the last
2 time I was there it may have been close to this dark
3 but this is as dark as I've seen it. And that item,
4 the prayer is very big. It's meant to be read. It's
5 very visible.

6 I believe that the city has made two major
7 arguments in this matter. One is that the Plaintiff
8 doesn't have standing, and the other is how to apply
9 the Establishment Clause precedent.

10 On the standing issue, as we pointed out in our
11 brief, we didn't find any cases where a school
12 department had basically gone after their own 15 or now
13 16-year-old kid and said that she's got the intestinal
14 fortitude, that she really doesn't care about this and
15 basically trying to cast her as a professional
16 litigant. The evidence doesn't support that at all.
17 She is just a kid. And when she -- unlike some kids,
18 she realized when she was at a pretty early age, ten or
19 so, that she did not believe in God. And she pretty
20 much, except for her family, kept that to herself. And
21 she didn't seek out this issue. She didn't even know
22 there was a prayer in the school. She goes to Cranston
23 West because she lives in the neighborhood. It's her
24 public school.

25 Her first year there she was in the auditorium.

1 She didn't read it until towards the end of the first
2 year when a friend of hers pointed it out, said to her,
3 did you know there was a prayer in the auditorium.
4 Well, she went and read it. And from that moment on,
5 as she's testified in her deposition, in her affidavit,
6 it took her back. She was very upset. It offended her
7 because, "What is a prayer doing in my school? I don't
8 believe in God. I feel left out." And she has been --
9 said that throughout these proceedings.

10 As we've pointed out in our briefs and as the
11 exhibits will show you, there are many occasions that
12 high school students and now juniors, as she is a
13 junior, are required to attend programs in the
14 auditorium from the beginning of the year until the end
15 of the year. And there are enrichment programs.
16 There's extra-curricular programs, there are
17 rehearsals, there are performances that the auditorium
18 is used for.

19 The Defendants suggest that in order for
20 Ms. Ahlquist to have standing, she has to avoid the
21 auditorium. She has to deny herself the access to the
22 programs that are offered and in some respects required
23 in the auditorium or she does not have standing. We
24 have briefed the issue, and I believe that we have
25 provided the Court with numerous cases which make clear

1 that there is no obligation to avoid in order to be
2 recognized to have standing, and we do not believe that
3 the Defendants have pointed out a case where that was
4 held. There certainly were cases that they pointed out
5 where there might have been three Plaintiffs, two of
6 whom testified that they avoided whatever the
7 objectionable display or event was, and one who didn't.
8 And in those cases, the Court would say, well, we don't
9 need to get to that other issue because we have two who
10 avoid it. But no court to our understanding has
11 actually held as Defendants argue that in order to have
12 standing one has to absent oneself from the offensive
13 display. And that would be a remarkable position. It
14 is a remarkable position for the school department to
15 take concerning its required events for this student,
16 that the price for her to avoid a display that the
17 school says is just an historic or piece of artwork is
18 that she should not go and not attend things with her
19 classmates, with her friends and further heighten the
20 isolation that she's already experiencing. And we
21 submit that the case law does not support that and this
22 Court should not so hold.

23 The other thing that the Defendants argue is
24 that they have taken some statements that Ms. Ahlquist
25 made in social media or in interviews and said, A-ha,

1 she said the prayer doesn't offend me, or it's not
2 offensive, and that proves that notwithstanding that
3 she said in her deposition and in her affidavit that
4 she has always been offended by viewing the prayer and
5 it's always made her feel excluded, that this Court
6 should ignore her in-court statements and instead take
7 those words and conclude that she really doesn't care
8 about this display at all, that this is just some kind
9 of manufactured event where she has decided she wants
10 to be a Plaintiff and it's somehow -- just wants to
11 mount an Establishment Clause challenge.

12 It's a remarkable statement. We did not find
13 any other cases where a school department has said that
14 of its student. In fact, in most of them, standing
15 really doesn't come up at all. And in a lot of them,
16 the Plaintiffs are Doe, John Doe, Jane Doe and their
17 children. And as we pointed out in our reply brief, a
18 lot of that is because of the harassment that
19 individuals who identify themselves as out of the main
20 Orthodoxy as far as what the accepted religious beliefs
21 are, either because they are atheists or they are of a
22 different religious belief that's a minority in that
23 area, feel intimidation, isolation and retaliation from
24 coming forward.

25 In this case, Ms. Ahlquist testified that, yes,

1 she had said that the prayer is not offensive, and she
2 explained that she said it because she wanted to avoid
3 an escalation of the bullying and harassment that she
4 was suffering from others from having come forward and
5 opposed the prayer.

6 And not only is this a completely understandable
7 explanation, but we have provided in the answers to
8 interrogatories, in her affidavit, in the deposition
9 and in additional documents that we've submitted in
10 support of our reply, substantial evidence of the
11 various kinds of bullying and harassment and
12 intimidation that Ms. Ahlquist has been subjected to
13 since she became involved in this lawsuit and before.
14 These statements that the Defendants point to, and
15 there's only a couple of them, and we've discussed them
16 in detail in our reply brief, were in the spring of
17 2011, about the time that she was identified as a
18 person -- I think one was in March and one was in
19 April. There may have been one in May. This bullying
20 and intimidation predates that.

21 Not only did Ms. Ahlquist testify about it and
22 describe it in detail, pointing out that she has been
23 harassed and intimidated by her peers at school, on the
24 way home from school and in social media on the
25 Internet, we have included examples from her Facebook

1 page. And I don't know how familiar you are with
2 Facebook, but I don't go there but --

3 THE COURT: I've never been there.

4 MS. LABINGER: Well, I have a Facebook identity
5 because that's the only way I get to see the photos
6 that my daughter puts on her Facebook page, but,
7 otherwise, I'm kind of a rake that goes by in the
8 night.

9 THE COURT: My wife does that in my family. We
10 get all the grandchildren's pictures that way.

11 MS. LABINGER: I know. Sometimes it's too much
12 information.

13 Apparently, on Facebook, once you allow someone
14 onto your personal Facebook page, they can engage in a
15 public discourse with you that everyone else who's a
16 friend of yours can read, and that's for a private
17 Facebook page. There are also public Facebook pages
18 where it's just open to anybody who wants to look at
19 it.

20 There are many other forms of social media, but
21 we have provided several example pages, and this is
22 part of Exhibit 33, which I think are very poignant.
23 Ms. Ahlquist, as a young person who is used to using
24 that media and used to -- I don't even know if kids
25 talk on the phone anymore. They mostly text and use

1 Facebook postings, but engaged in a dialogue with some
2 people who had asked to be on her Facebook page. And
3 before she knew it, they were saying horrible, horrible
4 things about her to which she was trying to defend
5 herself until she finally realized with some prodding
6 that she needed to what they call defriend them or
7 block them and take those pages, I think she recounted
8 this in her deposition, to her school principal because
9 some of them were students in her school, and they said
10 horrible things about her and you will be able to read
11 them at Exhibit 33. That's the kind of interaction,
12 one snapshot of it that she was facing.

13 Now, as parents, many of us tell our children
14 when they're faced with a bully, don't let the bully
15 know he's getting to you. It will only encourage him
16 to do more. I don't know if that's good or bad advice,
17 but I remember giving it to my kid and that's
18 essentially and exactly what Ms. Ahlquist testified she
19 was trying to do, was to soldier on and make it seem
20 like she was above it. So there were a couple of times
21 when she said it's not offensive. And then in those
22 same contexts, she also said, you know, the words are
23 not offensive. They're a good motivation, speaking of
24 the message that is contained in the prayer. But she
25 also made it clear in those same interviews that she

1 found the religious nature of it offensive to her and
2 discriminatory to her as an atheist. And even before
3 the statements that Defendants point to as proving that
4 she was not offended and not upset by the prayer, long
5 before that, she wrote in January of 2011, and this is
6 Defendant's Exhibit 31, they put it in before we got a
7 chance to put it in, she wrote to someone else who was
8 asking her if she was thinking about joining a lawsuit
9 or becoming a Plaintiff: "I will probably be joining
10 in as a Plaintiff for this case, but I plan to do a lot
11 of considering first as this is a big decision for me
12 and will probably result in being hated by many, many
13 people all over Cranston and, of course, religious
14 people as well. I've already been facing quite a bit
15 of hate in school from people who clearly feel much
16 differently about the issue. As it is, however, I have
17 always been an outcast and really have nothing to lose
18 here, so I will probably just go for it."

19 These are pretty poignant words from somebody
20 who is barely mature about recognizing what she has
21 been facing and is going to be facing and decided that
22 it was important enough to her to take the risk. But
23 they make it clear that her concern with bullying and
24 intimidation was true and sincere and the Defendants
25 have not challenged that at all. They just are arguing

1 to this Court, just disregard that and hold on a cold
2 record that notwithstanding her testimony to the
3 contrary that this Court should take a couple of
4 statements, one out of context, the other one they
5 didn't even examine her on it at deposition to try to
6 explore just what she meant and, you know, why she said
7 that when she did as a basis to foreclose her from
8 mounting this challenge. And we submit that the facts
9 do not support that and this Court cannot credit those
10 statements over her statements under oath or
11 affirmation, I should say, and by affidavit and her
12 previous completely consistent statements that she made
13 statements minimizing the difference between her and
14 everyone else at times in an effort to try to deflect
15 the criticism, the hate, the bullying that was coming
16 her way so that she seemed more like she fit in.

17 That, I think, are the two main issues on
18 standing. We believe that she clearly has --

19 THE COURT: I have a question that nobody
20 addressed. You stipulated that she suffered damages of
21 \$25.

22 MS. LABINGER: Yes.

23 THE COURT: So isn't that enough to confer
24 standing in this case? She's got \$25 at stake. It's
25 not much, but it's more than nominal damages.

1 MS. LABINGER: Yes, your Honor. But I do --

2 THE COURT: That's an admission, isn't it, on
3 the other side that she suffered some harm as a result
4 of this?

5 MS. LABINGER: I would like to say that, but I
6 believe that in the context of the parties' agreement
7 that I would not argue that the Defendants are
8 foreclosed from making their argument. I just think
9 it's wrong, and we have established why it's wrong.
10 We've established that she has damages. The parties
11 agreed that because no one wanted to go into delving
12 into the full extent of all of these issues and any
13 contributing factors that since the primary focus of
14 our case is injunctive and declaratory relief that we
15 would agree that if the Court finds liability, she has
16 damages.

17 THE COURT: What do I find as liability, that
18 this is a prayer that cannot be maintained in a public
19 school, a violation of the Establishment Clause?

20 MS. LABINGER: Correct. And if you so find,
21 then in addition to any injunctive and declaratory
22 relief that you award, and we will be asking for that,
23 that the parties have agreed that damages are fixed at
24 \$25. And if you don't find liability, then there's no
25 damage award. And that's what the parties agreed to.

1 So I would love to be able to say it was waived, but I
2 can't do that.

3 THE COURT: That would have been sandbagging
4 you, as well.

5 MS. LABINGER: I'm not going there, yes. The
6 one thing I can tell you about this case is that it has
7 been a pleasure to litigate on the other side with my
8 brothers, the Joes Cavanagh, and we're all in this pro
9 bono. So although I certainly hope to get attorneys
10 fees someday, but for right now that has kept us all as
11 efficient as possible and trying to work together on
12 the issues that we could agree on and respectfully
13 disagree on the issues that we could not agree on. So
14 that's where we are on that standing issue.

15 On the Establishment Clause, I sort of led with
16 that. I do believe that we have set forth in our brief
17 and our reply brief very clearly that there is a
18 religious purpose and a religious effect to this
19 prayer. It is a prayer. It is not symbols. I notice
20 the city has pointed to the Las Cruces case. It's a
21 city in New Mexico that has three crosses as a symbol
22 in their city seal and some students painted it in a
23 mural in a school. The issue with symbols, of course,
24 is they can stand for the Crucifixion. They can stand
25 for in that case, apparently, a cemetery, crosses in a

1 cemetery because there was a big cemetery there, and
2 they can be interpreted in many ways.

3 I don't know how you can interpret a prayer that
4 says it's a School Prayer, that says "Our Heavenly
5 Father," that ends with "Amen" and in the middle says
6 "Help us, grant us, teach us," which is an invocation
7 to the Divine, as anything but religious.

8 I know that the city has tried to push that all
9 to one side and say it's not religious anymore, but
10 there's nothing about this case to support that as
11 we've outlined in detail in our briefs. It is not --
12 we've talked about the absence of calling it tradition.
13 We've talked about the fact that it is not
14 student-created art. This is not a bulletin board
15 where just anything -- when you walk through the
16 school, there were some bulletin boards. But most of
17 the stuff that -- everything in the auditorium, that
18 belongs to the school. Everything in the lobby, those
19 banners that we've pointed out, also convey the message
20 of the school to its students. These are Government
21 speech. This is a Government prayer. The statements
22 at the March 7, 2011 meeting, which is when the school
23 committee voted to retain the prayer and to resist any
24 litigation if it were filed, you will find not only the
25 minutes, which are very detailed, but a complete video

1 of the proceedings from start to finish, audio and
2 video that I urge the Court to review because you will
3 get the flavor of the atmosphere and environment in
4 which the school committee made its decision. It was
5 all about religion. It was all about saving and
6 keeping God in Cranston West. And we have quoted from
7 many passages of the individuals, the four members of
8 the school committee who voted in favor of keeping the
9 prayer, and they all -- I'm sorry. I can't say all,
10 but many of them referred to it as a student work of
11 art without knowing anything about the history or how
12 it was created. That was just basically a wish and a
13 hope. They all talked about their own religious
14 background. And they also talked about the fact that,
15 as far as they were concerned, that the prayer contains
16 a valuable message that they subscribe to. And that
17 makes it current, not some historical artifact that
18 just happens to be stuck on the wall. They actually
19 re-endorsed the message that's contained in the prayer.

20 Now, they may say, well, we were only talking
21 about some of the words and not all of them, because
22 the words talk about being a good sport and doing a
23 good job. And those are all good things. But it's in
24 context of asking Our Heavenly Father to help us, grant
25 us, teach us how to do those things, that that's what

1 we need in order to get it done.

2 We have also submitted the declaration of
3 Reverend Dr. Donald Anderson as evidentiary support for
4 the proper understanding of the prayer. It may be that
5 the Court doesn't need that to know that Our Heavenly
6 Father is a Christian formulation. For those of us
7 not --

8 THE COURT: Do you know where it comes from?

9 MS. LABINGER: It's in our declaration. That's
10 how I know where it comes from. I was more amused that
11 the city was telling you about chutzpah, which I'm a
12 little bit more familiar with than the Catholic version
13 of the Lord's Prayer.

14 THE COURT: It's in the Book of Mormon, and
15 that's an issue in this election. In fact, there are
16 some who say that Mitt Romney is not really a
17 Christian.

18 MS. LABINGER: We don't really want to go there.
19 We have enough on our plate, I guess, in this case,
20 right, Judge?

21 So we've submitted his declaration for further
22 evidentiary support that this is not only a prayer but
23 it is a Christian formulation of a prayer as opposed to
24 just distinguishing between religion and not religion,
25 it also distinguishes between religions. These are all

1 things as we've cited in our brief.

2 THE COURT: It certainly excludes the major
3 religions of the world.

4 MS. LABINGER: It does. And it certainly
5 excludes non-believers as the Supreme Court has
6 recognized as a big concern of the Establishment
7 Clause. And it does so in a public school. An
8 impressionable student, this one has formulated her own
9 views, but she feels excluded and ostracized by reading
10 the prayer and knowing that it is there and having to
11 face it when she is in the auditorium. That confers
12 standing upon her. The city says it's de minimis. We
13 don't agree that it's de minimis, but we also believe
14 that the case law is clear. You have to have enough to
15 get through the door. You don't have a measurement if
16 it has to be a huge amount once you have enough to
17 mount an Article III case, but we believe that she does
18 have that significant amount. This is a significant
19 issue. It's taken a lot of courage for her to come
20 forward and continue on with this case. I know that
21 the city will say that she is now a rock star in the
22 atheist community. And whether that's true or not, she
23 is certainly not in her home community and in her
24 school community -- it's taken a big toll upon her and
25 it has required a lot of courage for her to come

1 forward.

2 I think I covered everything I wanted to cover
3 today.

4 THE COURT: You almost took the hour.

5 MS. LABINGER: I'm sorry. Thank you very much.

6 THE COURT: We'll take a recess between
7 arguments to give the stenographer a rest.

8 (Recess.)

9 THE COURT: Mr. Cavanagh, you may proceed.

10 MR. CAVANAGH, JR.: Thank you, your Honor. Like
11 Ms. Labinger, we briefed this case extensively and I
12 want to highlight certain points for you, and I can
13 tell that you're familiar with the issues from your
14 questions.

15 Let me just start off with I do think that the
16 Van Orden case and Judge Breyer's opinion is a very
17 important opinion for this case because of the way he
18 approached the tests that the Court have used and what
19 he thought were the key factors but what he prefaced
20 all of his remarks in that opinion were was with this
21 point. These cases are fact-intensive cases, and these
22 cases turn very much on what the facts are. And I
23 think that's very true in this case.

24 And this case is about whether there's a secular
25 purpose in this mural on the wall at this time or

1 whether there's a religious purpose that's
2 impermissible under the Constitution. And the focus on
3 that would be the facts and circumstances that would
4 allow the Court to apply the various tests under those
5 circumstances.

6 Just to backtrack for a second on the facts,
7 Cranston West High School really probably would be an
8 example of many high schools in this country,
9 post-World War II baby boomer kids, Eisenhower era,
10 apple pie, flag, a different way of life. Back in
11 those days, they had School Prayer. Back in those
12 days, they did the Our Father and no one thought twice
13 of it. That's the way it was.

14 THE COURT: I lived that.

15 MR. CAVANAGH, JR.: Right. So did I, your
16 Honor.

17 THE COURT: But the amazing thing was when we
18 said the School Prayer and the Our Father in English, I
19 really didn't understand it. My religious education
20 was entirely in French and French Dominican priests, so
21 whenever it was recited in the classroom, I didn't
22 recite it because I didn't know it in English.

23 MR. CAVANAGH, JR.: Well --

24 THE COURT: That makes me a little different
25 than everybody else.

1 MR. CAVANAGH, JR.: Right. Well, I was thinking
2 about in our brief we argued that over the Rhode Island
3 Supreme Court we have the phrase "Not under man, but
4 under God and law," but it's in Latin. So it may be
5 because it's in Latin no one's ever challenged it.
6 Although I don't know how it escaped Alan Berberian
7 over all these years, but apparently it did, your
8 Honor.

9 But going back to this time when this new high
10 school, if you will, in competition with its big
11 brother, Cranston East, they were transferring kids in.
12 The testimony in the record are that some kids didn't
13 even want to go to Cranston West; they wanted to go to
14 Cranston East. One of the big problems at that high
15 school was to develop tradition and develop something
16 that the kids could identify with.

17 So very early on various students went about
18 trying to come up with traditions in the school that
19 were important. And the record demonstrates that not
20 only did they pick school colors, the name of the
21 school newspaper, the mascot, but they came up with a
22 creed and a prayer.

23 And David Bradley is a witness. You see there's
24 an Internet tape of his. He testified before the
25 school committee, and he gave a deposition. He was the

1 student who wrote the prayer mural that is now being
2 challenged in this case. He wrote that in 1960. It
3 was approved by the school council and, as Ms. Labinger
4 said, it was recited over the loud speaker in the
5 school, and he proudly remembers that.

6 He also remembers that they stopped reading the
7 prayer. He didn't know why at the time. He speculated
8 that it was because in 1962 the Supreme Court decided
9 the Engel case, which was that a prayer mandated by the
10 State of New York was prohibited by the Constitution
11 and that stopped that type of prayer in the school back
12 at that time, recitation forcibly, if you will. They
13 stopped that.

14 He also recalled that the class of 1963, the
15 first graduating class gave as a class gift the creed
16 and the prayer that he had written. And they were
17 given by that class.

18 The vice-president of the class testified that
19 the class paid for it themselves. It was their idea.
20 They commissioned an artist who was the same artist who
21 didn't work for the school department but who had done
22 some artistry at Bane because Mr. Zito remembered when
23 he was at Bane that they had over the science classes
24 murals of dinosaurs and different scientific things
25 that were very attractive, and they decided that they'd

1 try to get this man to do that, and that's what he
2 testified to. That's how that came to be on the wall
3 in that form. They did that.

4 I just want to make clear because I think it was
5 a little confusing the way it was described is
6 Mr. Bradley did testify that he wrote the creed and the
7 prayer. I think if you look at the Bane Creed and the
8 Cranston West Creed, they're almost the same. So it
9 looks as though he may have copied that. The prayer,
10 however, is different. There's no indication that that
11 was not a student-created prayer by Mr. Bradley. No
12 question about that, that that's what that was.

13 He tried to do it in a way that he thought would
14 be inclusive at that time, and he wrote up aspirations
15 that I suppose we'd all agree to, do your best, grow
16 mentally, morally, physically, be kind to people,
17 classmates, teammates, be a good sport, et cetera,
18 values of friendship and be a credit to Cranston West.

19 And in those times, it was legal to say "Our
20 Heavenly Father" or to say "Amen." And that's what
21 they did, and that was part of the heritage of the
22 school in the 1960's. That's how he wrote the prayer
23 and that's what people said. They have the school
24 colors. They have the school mascot. They all have
25 all of those things. So that's the history of this.

1 And it's really a kind of an innocent --

2 THE COURT: How does that save it under the
3 Constitution, the First Amendment?

4 MR. CAVANAGH, JR.: I think it saves it because
5 it isn't a prayer that's been forced upon anybody.
6 It's a statement of the old way the school was, just as
7 we have "In God We Trust," that's the way we used to do
8 it. It's a tradition in our country. The Declaration
9 of Independence has references to God, because it was
10 in history. That's the way it was in history.

11 The question in this case with this particular
12 mural on the wall now is does it have an ostensibly
13 predominant religious purpose? Is that why it's there
14 and is that its effect? And under the circumstances of
15 this case, the history I just gave to you is this is
16 not a case like Stone, which the other side thinks it's
17 their best case where the Kentucky legislature in the
18 1980's passed a statute that mandated that if you had
19 private funding you had to put the Ten Commandments in
20 every classroom, and the Court found that to be a sham.

21 The Court found that to be having an underlying
22 predominant religious motive, and it was being done, if
23 you will, injected into the scenario of the '80's into
24 the school system, if you will, almost a reaction
25 against what some would say were misguided

1 interpretations of the Establishment Clause up to that
2 point. In other words, the Government decided we're
3 going to do something and push that ahead.

4 Our case grew up with none of that. Our case
5 grew up just like the Declaration of Independence, just
6 like "In God We Trust." It was innocent. It came out
7 of the fabric of the community and the school and wound
8 up on the wall of the school as a gift of the first
9 graduating class, not to be put up on there to force
10 prayer in people or anything, but because this class at
11 that time put it up. And it wasn't illegal at that
12 time to put something like that up. No one had
13 declared that. Engel was forced coerced recitation of
14 a state-created prayer. That's what Engel was in 1962.
15 We didn't have all of the nuances that we seem to have
16 had today as this made its way, the Establishment
17 Clause, to where it is today.

18 So the history of this is important because of
19 how it came up. The Government's motive certainly back
20 then and the way the students did this had nothing to
21 do with any forcing religion on anyone. This is simply
22 this is one of our traditions. The 1964 class put up
23 the bronze Falcon, which was their mascot. The other
24 classes, as you saw, have given other gifts. The first
25 class there at the time that the creed and the prayer

1 were made a part of fabric of that community put it up
2 on the wall.

3 So that's the history issue that I think is
4 important because it's different than injecting or
5 infusing or doing a latter day run around the law to
6 try to sneak it into a school. That's what the Court
7 in Stone didn't like. That's what they didn't like in
8 McCreary either because someone decided very relatively
9 recently to put the Ten Commandments in the foyer of
10 the courtroom to see what that does. No one did that
11 in this case. This grew up just like we have many,
12 many references to religion in our society by history
13 because it was true. That's the way it was. It wasn't
14 put there for a purpose. Wasn't put there to deliver.
15 It was put there because this was a gift and it was
16 part of the tradition. Then we learned what happened
17 to that afterwards. There's absolutely no question
18 that decade after decade has gone by, and they've never
19 recited the prayer at Cranston West. It is never used
20 for a religious purpose at all. The testimony is
21 undisputed that when it was first given at a ceremony,
22 there was no religious ceremony and it wasn't recited.
23 The only conflict on that issue is that, as
24 Ms. Labinger said, this one teacher who later was a
25 principal who thinks he remembers in the early '60's,

1 right -- '64, he was a teacher there from '64 to '72,
2 he thought he remembered that they might have recited
3 the prayer. He thought maybe the creed, too. He
4 wasn't sure. Mr. Zito said that when he was there they
5 never did that.

6 More importantly, Mr. Bradley, who wrote the
7 prayer said when he graduated in 1965, so he was there
8 for a couple of years after it was on the wall, said,
9 They never recited my prayer ever again after they
10 stopped doing it in 1962. That was his recollection.
11 And it's also undisputed that in the '70's, in the
12 '80's, in the '90's, the first part of this century,
13 the first decade, no prayer. No question while this
14 Plaintiff was a student at Cranston West, no prayer, no
15 reference to the prayer, no highlighting of the prayer,
16 nothing to do with the prayer under those
17 circumstances. It's just there, a mural on the wall
18 with other banners of the tradition of the school that
19 have been added over the years throughout, not only in
20 the auditorium but throughout the school. Different
21 traditions, if you will, that were very important.

22 So that what we have is this got up on the wall
23 because it was a gift and because it was part of the
24 history of the school with no other purpose, no
25 religious motive whatsoever as evidenced by the fact

1 that it's never been used for a religious purpose.
2 Now, there are religious words. There are religious
3 words in that. And the question, I think, for the
4 Court is, is it impermissible under our way of life,
5 under our Constitution to have some religious words in
6 a context in a public school, a high school, or is it
7 absolutely illegal because there's a reference to a
8 prayer and a reference to a God.

9 THE COURT: Well, if you referenced the entreaty
10 that was to the Great Buddha, what do you think then?

11 MR. CAVANAGH, JR.: If the Great Buddha in those
12 -- and that's what the people in the 1950's and '60's
13 had made as their prayer and it had been given as a
14 gift of the school and it grew up like that and it was
15 just kind of a keepsake, if you will, of the early
16 traditions of the school, that would be fine. What
17 would be wrong with that? Because it's really a
18 secular purpose. It's a secular purpose that it's up
19 there for now.

20 And that gets me to the school committee of
21 2011. What did they do? All they did was say we're
22 not going to erase history. This is the history of the
23 school. That's the way it is. We don't think the
24 Constitution means we have to take that down because
25 there's some religious reference.

1 In the Hanover case, the Freedom case, the First
2 Circuit said, I think very appropriately, it takes more
3 than the presence of religious content to have the
4 effect of advancing religion, let alone to do so as a
5 primary effect. Really, that really is what we have
6 here. There is religious content. And in Van Orden,
7 Judge Breyer and other judges recognized the Ten
8 Commandments are religious content. They're lifted
9 wholesale from sacred scripture. That's religious
10 content as opposed to Mr. Bradley created a teenage kid
11 who did his best on his own prayer. This is lifted
12 from sacred scripture. It's on the Capitol grounds in
13 Texas, and the question is, is this permissible. And
14 the Court said it has a religious message but that's
15 not the predominant message. It's in a secular
16 setting. It's not used for religious purposes.
17 There's no meditative setting for that. There's no
18 evidence that it was ever used for religious purposes.
19 Isn't that on all fours with our case? It's never been
20 used for religious purposes since it's been up on the
21 wall. It's obviously not a meditative thing. In fact,
22 you can't even see it from most places in that
23 auditorium. And you certainly have to be very close to
24 it to be able to even see what it says. You've got to
25 be in one quadrant of that auditorium to see that.

1 THE COURT: I can't test that because the
2 lighting was so bad.

3 MR. CAVANAGH, JR.: Well, that's the way the
4 lighting was. You know, I looked around the
5 auditorium, and I noticed that there were a whole host
6 of lights up in the wall that didn't have any light
7 bulbs. I know it costs a lot of money to bring in
8 things to put that up. I thought they did that to
9 prove that they couldn't pay my legal fees, but she
10 thought they did it to make it dark. But in any event,
11 it's expensive to do that. My understanding is that
12 when finally the lights get so dark they spend the
13 money to erect everything to have to go up and do all
14 of that, and that's the way it is.

15 My point is, your Honor, even if the lights were
16 on, it's not forced upon anybody. It's a historical
17 document just like the rest of these things as the
18 tradition of the school. And I think that's really
19 important in it because in Van Orden, you have the Ten
20 Commandments, religious content, some religious
21 message, but the predominant message is secular. What
22 is the message in that auditorium, a religious foisting
23 or a Government sponsor of religion? It is just
24 history. And actually, the school committee -- I don't
25 know where we got the idea that it was whim and fancy

1 on March 7th that they dreamed up that it was a
2 student-created prayer. Mr. Bradley testified that he
3 did the prayer. Those were the facts. That was
4 student-created. What it didn't have on it was it
5 didn't have any notation of that, and it didn't have
6 the notation that it was a class gift. It did
7 originally, according to Mr. Zito, the vice-president,
8 he said that there was -- he remembers that it recorded
9 that in some way explained that it was a class gift.

10 And as you saw in the view, there was a place
11 there, Mr. Zito testified in his deposition when he
12 went there this summer and looked at this in
13 preparation for his deposition, he saw that same place
14 and he said that's where that was. And in the record,
15 the best understanding of that is that was painted
16 about 10 or 15 years ago and inadvertently or
17 negligently was painted over. So that there's no
18 attribution, if you will, that it was a gift of the
19 Class of '63. And in fact, it would probably be better
20 if that was the case.

21 We mentioned in our brief that the school
22 committee not only voted to not erase the wall but to
23 put an explanatory plaque up, but because we're in
24 litigation, we didn't do that; but I think that would
25 be better to do that and explain that.

1 The point, your Honor, is this is a secular
2 setting. This is not a religious setting, and that's
3 the key issue. And Judge Breyer in Van Orden went
4 through all of those factors. And Van Orden is
5 remarkably close to this except this mural has been on
6 the wall longer, and no complaints, which he thought
7 was determinative in Van Orden, the fact that it was
8 there for so long and no one complained until now. He
9 thought that was a key factor.

10 He also thought that a key factor here was to
11 avoid divisiveness, to avoid -- the Establishment
12 Clause was not supposed to cause divisiveness. One
13 looks at that and we say -- what I'm saying is I
14 suggest that even though this is a public school, and
15 the First Circuit dealt with that, the pledge of
16 allegiance was a public school. It's just a factor
17 courts are more vigilant for obvious reasons. I would
18 be more vigilant in kindergarten than I would in
19 grammar school and junior high. High school, college,
20 I mean, it comes a point in today's world the level of
21 sophistication that kids have.

22 So the point is that's a factor in these cases.
23 I'm not denying that. But it isn't a distinguishing
24 factor given these facts, the way this came up, and the
25 way this isn't in your face.

1 This Plaintiff testified that in two years she
2 had been in the auditorium eight to ten times. Now,
3 this isn't in a classroom every day. This isn't
4 referred to. This isn't recited. This isn't voluntary
5 recitation. There's no participatory ceremony at all.
6 It's a passive secular display, part of the history of
7 the school. It has some religious words in it, but
8 there's breathing room. There has to be under the
9 Establishment Clause because, otherwise, it's hostility
10 towards religion. It's rip it out. Where do we start?
11 In God we trust, why don't we do that? Under God and
12 man, why would we have that? That's a reference.
13 Where do we stop this? The Court has borderline cases.
14 The Court dealt with borderline cases. Van Orden was a
15 borderline case.

16 I urge the Court that just because it's in a
17 public school doesn't mean, oh, we have -- and it says
18 prayer -- all of those prayer cases, Stone an
19 exception, the others are exercises, recitation,
20 participation, praying, using it for religious
21 purposes. This is nothing like that. This is an
22 historical timepiece. And the record is that's how it
23 evolved. We didn't just push it in to sneak it by. We
24 didn't put it in anybody's face. There's breathing
25 room for this. There's breathing room under these

1 circumstances.

2 There's probably more I should say. Standing.
3 Why do we raise standing? Because we have a remarkable
4 situation that you don't normally have. We have a
5 series of absolutely inconsistent statements by an
6 intelligent person that fly in the face of the standing
7 requirements under law by her repeated statements that
8 the words weren't offensive. It was the people who
9 insist that it can stay on the wall that irritated her
10 and got her upset. That's what she said. Now, if
11 that's not standing, that's not offended-observer
12 standing, that's make-a-point standing, that it's
13 illegal standing but not an injury-in-fact standing.

14 Now, the explanation, of course, is: I want to
15 tone it down. I didn't want -- so instead of saying
16 that the words were offensive, in order to tone it down
17 so that people wouldn't harass and bully, I said it's
18 the people who get me mad. They're the ones who
19 offend.

20 Now, that really doesn't make any sense, and it
21 suggests kind of an afterthought as to, whoa, I have a
22 standing problem. (Reading:) But what I have said on
23 many occasions is, honestly, I know the prayer is not
24 offensive. That's not the problem. I think that
25 religion is counter-productive and has absolutely no

1 place in public schools. Yeah, I'm not offended by it,
2 but you can't violate the Constitution. The prayer
3 isn't offensive. The message it gives is positive. It
4 is supposed to be something that encourages kids, so,
5 no, it's not really offensive. What is offensive is
6 that people are so adamant about keeping it.

7 That's a classic example of non-standing, and
8 those are the cases the courts have said you can't go
9 around finding constitutional violations and getting
10 advisory opinions from courts.

11 Now, they claim that we're attacking her for
12 doing that. No, we're not. We're just saying this is
13 what she said, and we don't normally have admissions of
14 that kind. But in a way, it ties in, it ties in, her
15 very first -- she didn't notice it. She was in the
16 auditorium all through her freshman year on a number of
17 occasions and didn't even know it was there. When
18 someone pointed it out to her, she said, I forgot about
19 it. It wasn't really the first thing on my mind. And
20 then over the summer I heard about an adult complained,
21 heard about the ACLU involvement and then got involved
22 and then got solicited by the ACLU and she's a
23 Plaintiff. So that's what it is.

24 Why do I raise that? Because I think this is an
25 obscure not-in-your-face mural on the wall. This isn't

1 in a classroom every day. No one recites it. No one
2 refers to it. No one does anything with it. And what
3 this case represents is just because it has some magic
4 words that someone thinks are just prohibited, they
5 should be pulled out. And I'm saying that this isn't
6 what Van Orden is about. This isn't what the
7 Establishment Clause is about. It will be divisive.
8 It doesn't make sense. The history shows no one was
9 upset with this, no complaints.

10 Judge Breyer had it right. You can look at all
11 these tests, you can apply Lemon, you can do the
12 coercion, you can do all of that, but it's legal
13 judgment. And you're good at that. Legal judgment on
14 these facts. And this case is not a case that is
15 Government advancing of religion, Government favoring
16 religion, Government forcing religion on anybody. It's
17 a historical timepiece. It's got a secular purpose now
18 and always did have a secular purpose from the time it
19 went up. The people who did it then were innocent.
20 The people now who voted on not to take it down are
21 just saying we don't believe that our Constitution
22 requires us to erase history. Thank you.

23 THE COURT: Thank you.

24 Any rebuttal?

25 MS. LABINGER: Very brief. I will be brief this

1 time.

2 THE COURT: All right.

3 MS. LABINGER: I mentioned that Justice Breyer
4 gave the supporting vote in Van Orden. He also --

5 THE COURT: Why all this emphasis on Justice
6 Breyer? Otherwise, it would have been four, four?

7 MS. LABINGER: Yeah. So that the rule is
8 whoever has the -- he tipped the scale over to
9 rejecting the Establishment Clause claim, which gave
10 five votes to the monument staying; and then under
11 Supreme Court precedent, you look to the least
12 expansive ruling that resolves the case, which makes
13 his the determinative factor. The very same day, as I
14 mentioned before, he went with the four dissenters in
15 Van Orden to make a five-person majority in McCreary.

16 He made clear in Van Orden that he thought that
17 the Lemon test wasn't particularly helpful in that very
18 borderline case, and he specifically excluded from the
19 category of difficult borderline cases, which is where
20 he put this passive display, religious displays, not
21 recitation of prayers, but religious displays on the
22 grounds of a public school where, given the
23 impressionability of the young, Government must
24 exercise care in separating church and state. We talk
25 about this in both our opening brief and our reply.

1 As I said before, I don't believe that you can
2 equate, and I don't think the First Circuit did in the
3 Freedom From Religion Foundation case, the words "Under
4 God" in the pledge of allegiance, which is a patriotic
5 statement.

6 THE COURT: Which came into the pledge during
7 World War II.

8 MS. LABINGER: Yes. I understand it was
9 actually an anti-Communist thing to try to distinguish
10 the -- that's what I understood it was, that it had to
11 do with distinguishing the United States from Communist
12 countries where religion was prohibited.

13 But that is not what we have here. We have a
14 prayer. It is not an independent document. It's not a
15 Government document declaring independence of the
16 Colonies from the King of England where they happened
17 to make reference to the endowed by their creator, but
18 what they're really talking about in that case is we're
19 disaffiliating from the King of England.

20 This is a prayer. It is styled as a prayer. It
21 has no other purpose except to be a prayer. I think
22 that the city reliance on Van Orden is just really
23 putting too much reliance on the one case that -- and
24 the Court was willing on a very split, fragmented
25 decision to uphold a passive display in a big park.

1 And I think that the reference that Mr. Cavanagh made
2 to divisiveness was an acknowledgment by Justice Breyer
3 that there were about a hundred of these monuments
4 scattered throughout the country that had all been
5 donated by the Fraternal Order of Eagles and that that
6 would create some divisiveness or issues if they
7 declared that they could not stand. That's not our
8 issue here.

9 And the proof of that, in some respects, is what
10 the city did at Bane, which we don't know why they did
11 what they did at Bane. It was suggested that we were
12 complaining that they remove the prayer. That's not
13 true. We're not complaining that they remove the
14 prayer. We're just puzzled, and we were unable to get
15 an answer and other than on advice of counsel we're not
16 going to tell you anything more as you will see from
17 the 30(b)(6) deposition of Mr. Lombardi. We pressed as
18 many ways as we could. Don't understand why the creed
19 was taken down. It's an innocuous document but it
20 went, too.

21 The fact that a student composed the prayer does
22 not make a paid-for professional sign created by
23 someone hired by the Class of 1963 a student-created
24 work of art. They're mixing apples with oranges. It's
25 not a student-created work of art. It certainly is a

1 gift from a class accepted by the city. It's become
2 Government speech. And I will not go back through my
3 argument again.

4 I thank you so much for your patience today.

5 Thank you.

6 THE COURT: All right. Thank you both for very
7 excellent arguments. I will take this matter under
8 advisement and write another opinion in my old age.

9 (Court concluded at 5:00 p.m.)
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C E R T I F I C A T I O N

I, Anne M. Clayton, RPR, do hereby certify
that the foregoing pages are a true and accurate
transcription of my stenographic notes in the
above-entitled case.

/s/ Anne M. Clayton

Anne M. Clayton, RPR

March 21, 2012

Date